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No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI AND ANDREW J. YUHAS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court entered in this cause dismissing the indictment.

OPINIONS BELOW

The orders of the District Court dismissing the indictment and denying the Government's motion

for rehearing are not reported. Copies of these orders embodying the opinion of the court are attached hereto as the Appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on March 28, 1950, and the order denying the Government's motion for rehearing was entered on April 12, 1950. The jurisdiction of the Supreme Court to review on direct appeal the decision of the District Court sustaining, prior to the attachment of jeopardy, the defendants' plea in bar to the indictment is conferred by 18 U.S.C. 3731. The following decisions sustain the jurisdiction of the Supreme Court: *United States* v. *Hark*, 320 U. S. 531; *United States* v. *Murdock*, 284 U. S. 141; *United States* v. *Goldman*, 277 U. S. 229; *United States* v. *Oppenheimer*, 242 U. S. 85; cf. *United States* v. *Storrs*, 272 U. S. 652.

QUESTIONS PRESENTED

1. Whether the conviction of defendant Williams under Section 20 of the Criminal Code, 18 U. S. C. (1964 ed.) 52, barred the instant prosecution for perjury under 18 U. S. C. 1621 for false statements made during the course of the trial.

2. Whether the acquittal of defendants Ford, Bombaci and Yuhas in the prosecution under Section 20 of the Criminal Code barred the instant prosecution for perjury for false statements made during the course of the trial.

3. Whether the defendants could be prosecuted for perjury for false statements made during the course of their trial for conspiracy under Section 19 of the Criminal Code, 18 U. S. C. (1946 ed.) 51.

in view of the fact that a superseding indictment under which they were later tried was subsequently held to be invalid by the Court of Appeals.

STATUTE INVOLVED

18 U. S. C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

An indictment in 48 counts was filed in the District Court on February 25, 1949, charging the defendants separately with various acts of perjury in the course of their earlier trial under an indictment charging them with conspiracy under Section 19 of the Criminal Code[1] and with substantive

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[1] "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

offenses under Section 20 of the Criminal Code,[2] 18 U. S. C. (1946 ed.) 51 and 52. In brief, defendant Williams was charged with having falsely testified at the earlier trial that he did not beat the victims of the violations of Sections 19 and 20, and the other defendants were charged with perjury in denying that the victims were beaten by Williams in their presence. Williams had been convicted of the substantive offenses under Section 20 and his conviction was affirmed by the Court of Appeals for the Fifth Circuit, 179 F. 2d 656, petition for a writ of certiorari pending, No. 354 Misc. The other defendants had been acquitted on the substantive charges and the jury failed to agree on a verdict on the conspiracy counts under Section 19. A superseding indictment was later returned under Section 19 and the Defendants were retried and convicted. On appeal, the Court of Appeals reversed the conviction and directed that the indictment be quashed. *Williams et al. v. United States*, 179 F. 2d 644, petition for a writ of certiorari pending, *United States* v. *Williams et al.*, No. 659.

The defendants Williams, Ford and Yuhas moved to dismiss the perjury indictment and on March 28, 1950, the District Court dismissed it as to all the defendants, holding:

1. Conviction of Williams on the perjury charges relating to the Section 20 counts would constitute

[2] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

double jeopardy, because his conviction on those counts involved "the beating of the victims" and the beatings are "involved in the counts in this perjury indictment."

2. Since defendants Ford, Bombaci and Yuhas were adjudged not guilty under the Section 20 counts, either as principals or accessories, they were found not to have "seen or observed Williams beat the victims," for this "was a part and parcel of the charges against them" in the Section 20 counts, and therefore the counts in the perjury indictment based on alleged false swearing in respect of the Section 20 counts "are bad."

3. Since the superseding conspiracy indictment under Section 19 on which all the defendants were tried, convicted and sentenced was ordered quashed by the Court of Appeals, "there was no jurisdiction or right to try the defendants on the [original] conspiracy counts * * * and the counts in this perjury indictment based on the conspiracy counts * * * are bad."

In its order and opinion of April 12, 1950, denying the Government's motion for rehearing, the District Court stated that it had reexamined its ruling of March 28, 1950, and adhered to its original decision.[3]

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of importance in the administration of the criminal law,

[3] Since, in respect of each ground of the District Court's decision, the effect is to bar prosecution for the offenses charged, the decision is one sustaining a motion in bar within the meaning of the Criminal Appeals Act, 18 U. S. C. 3731. See *United States v. Hark*, 320 U. S. 531, and the other cases cited above as sustaining the jurisdiction of the Supreme Court.

for the effect of the decision of the District Court is to grant an unwarranted immunity to defendants in criminal trials who falsely testify. There is no rule of law which permits perjury to be committed by a defendant who waives his immunity under the Fifth Amendment to the Constitution and chooses to testify at his trial. The oath taken by a defendant should, and does, have the same meaning as the oath taken by any other witness.

1. The prosecution of defendant Williams for perjury would not constitute double jeopardy, since that doctrine applies only where the two offenses with which the defendant has been charged are identical in law and in fact. E. g., *Burton* v. *United States*, 202 U. S. 344; *Gavieres* v. *United States*, 220 U. S. 338. "It is only an identity of offenses which is fatal." *Pinkerton* v. *United States*, 328 U. S. 640, 644. Obviously, perjury committed on the trial of the defendant for another offense is distinct in law and fact from that offense and a prior conviction or acquittal does not constitute former jeopardy as to a prosecution for such perjury. *Youngblood* v. *United States*, 266 Fed. 795, 797-798 (C. A. 8); *Allen* v. *United States*, 194 Fed. 664 (C. A. 4); *United States* v. *Butler*, 38 Fed. 498 (D. C. E. D. Mich.).

2. The acquittal of defendants Ford, Bombaci and Yuhas on the substantive counts under Section 20 did not constitute an adjudication of the issues of fact involved in the instant prosecution for perjury. As to these defendants, the question is whether the facts testified to and as to which perjury is charged were necessarily adjudicated by the verdict of acquittal. Cf. *Sealfon* v. *United States*, 332 U. S. 575, 578-579. If the alleged

false swearing was as to a subordinate evidential matter and not a general denial, the prior acquittal does not bar a prosecution for perjury. *Kuskulis* v. *United States*, 37 F. 2d 241 (C. A. 10); *Lipscomb* v. *United States*, 33 F. 2d 33 (C. A. 8); *Youngblood* v. *United States*, 266 Fed. 795 (C. A. 8); *Chitwood* v. *United States*, 178 Fed. 442 (C. A. 8). Under the indictment and the District Court's charge to the jury in the Section 20 case, Ford was charged as a principal and Bombaci and Yuhas as aiders and abettors in activities constituting violations of the statute; that is, Ford and others allegedly detained and beat the named victims, aided and abetted by Bombaci and Yuhas, in deprivation of the victims' rights and privileges, including the rights to due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment. The perjury indictment charged these defendants with having testified falsely when they stated that they had not seen and observed Williams in the act of striking and beating the victims. That Williams engaged in these activities was established by his conviction in the Section 20 case. It was never adjudged that Ford, Bombaci or Yuhas had not seen or observed Williams engage in such activities. These defendants were acquitted of having engaged in the activities themselves, or of having aided and abetted in their performance; they were not acquitted of observing them being carried on. It is noteworthy in this connection that the trial court carefully charged the jury that Bombaci and Yuhas could not be held guilty as aiders and abettors merely because they were present when the beatings occurred. Consistently with the verdict of not guilty, Bombaci and Yuhas could have been

present at the beatings in question. There was no adjudication of this fact and the acquittals could not have been res judicata. And, for the reasons stated above, the same result would have followed even if the trial court had not given such instructions as to Bombaci and Yuhas.

Ehrlich v. *United States*, 145 F. 2d 693 (C. A. 5), upon which the District Court relied, is not authority to the contrary, since the decision in that case was predicated upon a finding that the fact testified to, and as to which the perjury was charged, was the very fact which constituted the basis of the original charge upon which the defendant had been acquitted. Hence, that decision is consistent with the general rule enunciated in the cases cited above.

3. The subsequent decision of the Court of Appeals invalidating the superseding conspiracy indictment under Section 19[4] did not vitiate the jurisdiction of the trial court to try the conspiracy counts of the original indictment. The trial court had jurisdiction over the parties and the subject-matter. Even if it erred in sustaining the validity of Section 19 as applied in the indictment, its jurisdiction was not divested by the subsequent decision of the Court of Appeals. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 289-295. It has often been held that a subsequent determination of invalidity of a statute upon which an indictment was based does not bar a prosecution for perjury committed at the trial of the indictment. *Boehm* v. *United States*, 123 F. 2d 791, 809 (C. A. 8), certiorari denied, 315 U. S. 800; *State* v.

[4] As noted above, a petition for a writ of certiorari to review this decision is now pending in the Supreme Court, No. 659.

Rowell, 72 Vt. 28, 47 Atl. 111; *State* v. *Mandehr,* 168 Minn. 139, 209 N. W. 750; *Kelly* v. *State,* 51 Tex. Crim. Rep. 507, 103 S. W. 189. See also *West* v. *United States,* 258 Fed. 413, 416-417 (C. A. 6); 2 Wharton, *Criminal Law,* Sec. 1538 (12th ed., 1932). Cf. *Knapp* v. *United States,* 302 U. S. 214; *Kay* v. *United States,* 303 U. S. 1, 6.

We submit that the decision of the District Court is wrong in all of its aspects and that the questions presented by this appeal are substantial ones which should be settled by the Supreme Court.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1950.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 7333-M-Criminal

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI AND ANDREW J. YUHAS, DEFENDANTS

ORDER

The several motions to dismiss the indictment in this case were argued on the 23rd day of March 1950. The defendant Bombaci filed no motion but a ruling on the motions filed and argued will serve to dispose of the case as to Bombaci.

First I shall discuss the counts in this indictment dealing with the substantive counts in case No. 7279. Williams has been convicted on the substantive counts in said case No. 7279. It is the beating of the victims by Williams that was involved in the substantive counts in case No. 7279, on which he was convicted, that is involved in the counts in this perjury indictment with reference to alleged false swearing in case No. 7279. Conviction in this case, No. 7333, would constitute double jeopardy.

Ford, Bombaci and Yuhas were found not guilty on the substantive counts in case No. 7279. While the defendants Yuhas and the corporate defendant were charged in the substantive counts with aiding and abetting, the defendants Ford and Bombaci could have been found guilty under the general law of aiding and abetting. The jury's determination that they were not guilty was a determination of their guilt whether as principals or accessories. Whether they had seen or observed Williams beat the victims was a part and parcel of the charge against them in the substantive counts. Under the

case of Ehrlich vs. United States, 145 F. (2d) 693, the counts in this perjury indictment based on alleged false swearing in defending the charges contained in the substantive counts in No. 7279 are bad.

Next I will discuss the counts in this indictment charging perjury in the defense of the conspiracy counts in case No. 7279. Subsequent to the trial in case No. 7279, a new indictment was also found which has four counts under Section 19 (18 U. S. C. Sec. 51), substantially like the four conspiracy counts in case No. 7279. On this last indictment each defendant was convicted and sentenced, and Williams, Bombaci, Perry and Ford appealed. The case was reversed and the indictment ordered quashed. Under these circumstances there was no jurisdiction or right to try the defendants on the conspiracy counts in case No. 7279, and the counts in this perjury indictment based on the conspiracy counts in case No. 7279 are bad.

The indictment in this case is dismissed as to all defendants.

Done and Ordered at Miami, Florida, this 28th day of March, 1950.

(S.) JOHN W. HOLLAND,
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 7333-M-Criminal

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAY G. WILLIAMS, CHARLES R. FORD, JOHN S. BOMBACI AND ANDREW J. YUHAS, DEFENDANTS

ORDER

Motion to quash the Court's order of March 28, 1950, and to grant a rehearing and reargument was presented to the Court on April 10, 1950. The Court has re-examined its ruling in order to determine whether a reargument will be had.

As to Williams and the counts in this indictment, based on false swearing in defending the substantive counts in Case No. 7279, the Court adheres to its opinion that conviction here would constitute double jeopardy.

As to Ford, Bombaci and Yuhas, and the counts in this indictment based on false swearing in defending the substantive counts in case No. 7279, the Court adheres to its opinion expressed in said order of March 28, 1950.

As to the counts in this indictment charging perjury in the defense of the conspiracy counts in case No. 7279, the Court is of the opinion that the holding of the Court of Appeals in the Williams Case, 179 F. (2) 644, as to indictment in the new conspiracy case, is to the effect that the conspiracy counts in case No. 7279 were bad to the extent that there was no jurisdiction to try the defendants on the conspiracy counts in case No. 7279, and that a charge of false swearing in the defense of said charges of conspiracy under 18 U. S. C. 51, would not lie.

Being of the opinion expressed, a reargument should not be ordered. The said motion is denied.

Done and Ordered at Miami, Florida, this 12 day of April, 1950.

(S.) JOHN W. HOLLAND,
United States District Judge.

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